

Delegation of duties to other than Government Employees:

OGC HAS REVIEWED.

6 CG 568, 569: "The matter of negotiating for the purchase of lands or any interests in lands for the United States as a general rule, is an administrative duty that cannot be delegated to anyone other than to responsible officers of the Government." In accord. 3 CG 720,721. 6 CG 463,464: The delegation to others, by contract, of duties for which the administrative officers are responsible is not authorized. Accord 6 C.G. 51 6 C.G. 474,475. (Persons hired to translate foreign languages.)

There is no authority to delegate by contract to a non <sup>work</sup> Government agency/which should be performed by a Government agency established by Congress. 12 CG 516,517 (Counting and sorting statistical cards). Accord 15 CG 951.

22 CG 1083, 1085, 1086:

"In performing official acts the Secretary of the Navy acts not as principal for himself but rather as an agent for the Government. The Floyd Acceptances 7 Wall 666. x x x an agent cannot without the principal's consent, delegate powers which involve judgment or discretion." (Citing cases)

Distinction between a contract for Services and a contract for a finished product:

3 CG 709:

Here the Department of the interior desired a specific manuscript article upon psychological tests. A contractual agreement was entered into under a short form contract, Art. 1, thereof, providing:

"The party of the second part agrees to furnish a manuscript on intelligence testing, in typewritten form and acceptable to the Commissioner of Education on or before January 1, 1923."

The Secretary of the Interior contended that this was a contract for a finished product for which a specific sum was to be paid, and that it was not intended as a contract for personal services.

Held: "This contract, however, indicates that what it was really sought to produce was not material or a commodity in existence, or to be produced according to sample or specifications, and which is subject to sale, but rather the services of a particular person having the necessary attainments to prepare a treatise upon a special subject. The fact that the service was engaged by contract instead of by a special appointment, and that compensation was fixed in some other manner than on a basis of a stipulated unit of time, does not operate to establish the character of the transaction as a purchase." (underscoring supplied)

Then quoting 26 MS Comp Gen 664, Oct. 15, 1923:

"When a person is engaged in advance by agreement, contract, ~~or~~ or otherwise to render a service such as the making an investigation, the compiling of data, the writing of articles, preparation of material ~~etc~~ for a report etc. the service rendered is and must be regarded as a personal service."

"Under whatever form the right to pay arises whether # under formal appointment or by entering into a contract to perform certain services, it is a right to pay for personal services and the appropriation under which payment is to be made must specifically be available for personal services."

19CJ 941: An applicable act provided that the agency involved could place orders with other agencies for services of any kind, "provided however that if such work or services can be as conveniently or more cheaply performed by private agencies such work" could be let to the private agencies. The agency involved desired to let a contract for testing certain materials. The CG drew the following distinction between contracts for "inspecting" and "testing," in distinguishing a former opinion:

"The term 'inspection' x x would seem to be confined to 'the act of inspecting' x x for the purpose of determining x x whether the supplies x purchased properly were prepared or assembled in accordance with specifications x x. In that sense, it is a personal service and as such a governmental function involving personal judgment, and properly is for performance by Government employees under Government supervision." (underscoring supplied)

The CG then went on to say that the above quoted act could never be construed to authorize contracting with private agencies for the performance of Governmental functions involving personal services such as "inspecting."

However, the CG points out, "testing" may be said to be the determination by scientific means of the physical or chemical properties or elements of a material" requiring not only the services of persons possessing certain technical knowledge, but also special appliances x x and involve not so much the element of personal judgment as the application of established scientific principles and procedures. In such cases the results to be accomplished are not dependent upon personal judgment, would not be affected by Government supervision, and the services generally are not necessarily for performance by Government personnel, unless specifically so provided by law."

17 CG 300,301:

"The general rule is that purely personal services may not be engaged by the Government on a nonpersonal service contract basis but are required to be performed by Federal personnel under Government supervision. x x The fees or amount or the contract price paid in accordance with the terms of a non-

personal service contract based upon the results to be accomplished rather than on time actually worked on the job, covering not only the contractors time but also, the use of his facilities, office, staff, equipment, etc.--does not constitute salary.

1. The above cases indicate that, in general, the rule applies that it is permissible for the Government to contract with an independent agency for a given result provided that:

- a. The result is one which is contemplated by the law creating the agency or,
- b. the result is one for which expenditures are justified under the appropriation language of the particular agency, and,
- c. the result is not one which by the appropriation language or by the law establishing the agency, the agency should itself accomplish, and,
- d. the contract for the result desired does not involve personal services, that is to say that in carrying out the result the contractor does not in effect become the agent or servant of the contracting agency in the substantive law sense.

2. A Government agency cannot by contract delegate either:

- a. Administrative duties for carrying out its legal purposes.
- b. Responsibilities which are inherent in its functions as created by law.
- c. The selection and or supervision of personnel to accomplish a or b above.

3. An agency may contract with an expert or individual for services, without regard to the Civil Service laws where:

- a. The contract is made directly with the individual or expert, and not with an organization for the services of such individual in contravention of 2. c above.
- b. The law establishing the agency or appropriating funds for the agency either

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    i. Specifically provides for such services, and/makes it clear that such services are the only means by which the purposes of the agency, as established by such law, can be

carried out.

4. Though EO 9001 as extended to OSS by EO 9241 allows OSS to enter into contracts without regard to the provisions of law relating to the making, performance or modification of contracts, this does not abrogate the provisions of the Act of August 5, 1882, 22 Stat. 255 which prohibits the expenditure of Government funds for the expenses of accountants or experts unless the pertinent appropriation specifies otherwise.

Even though .002 funds would be specifically exempted from the operation of the statute just referred to, the decisions above cited are sufficiently clear to establish that, in the opinion of the comptroller general, such experts can under no circumstances be hired on other than a personal service basis unless what is required from them come within the "contract for a specific result" as defined in those cases. That is to say, a contract which does not require the personal supervision of the contracting agency, and which does not require that the contractor perform functions belonging <sup>properly</sup> to the agency or one which attempts to delegate the responsibility of the agency.

5. To answer the question put specifically the following seems clear:

a. A firm of accountants may under no circumstances be employed with .001 funds.

b. A firm of accountants could be employed with .002 funds provided that they were employed to give us ~~some~~ definite statistics and not to exercise administrative or discretionary powers of this agency.

c. Individual accountants could not be employed with .001 funds for any purpose connected with the "inaugurating of new or changing old methods of transacting the business of" this agency. They could, it would seem, be employed on a civil service basis for purely statistical purposes.

d. A firm of accountants could be employed on .002 funds to render a specific accounting, but not by contract which <sup>would</sup> give any member of the firm administrative or discretionary duties.

e. Individual accountants could be made regular employees of OSS on .002 funds for any purpose.